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INDIANA UTILITY
REGULATORY COMMISSION

IN RE COMPLAINT OF PARK
JEFFERSON V. NIPSCO

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CAUSE NO. 42671

You are hereby notified that on this date the Presiding Officer in this Cause makes the following Entry:

The complaint that is the subject of this proceeding was decided by the Indiana Utility Regulatory Commission's ("Commission's") Consumer Affairs Division in a written decision dated May 17, 2004. This docketed Cause was initiated as a result of the complainant's June 6, 2004 written request that the Commission review the decision made by the Consumer Affairs Division. Authority for the Consumer Affairs Division to render decisions on behalf of the Commission and for the Commission, upon request, to review those decisions is found at Ind. Code 8-1-2-34.5(b) and 170 IAC 1-1.1-5.

Ind. Code 8-1-2-34.5(b) provides:

Notwithstanding IC 8-1-2-54, the commission may investigate and enter orders on complaints filed by individual customers arising under this section. The commission may establish an appeals division to act on its own behalf regarding individual customer complaints. The decision of the division shall be binding on all parties to the complaint. The commission shall review decisions of the appeals division upon timely request by an affected party.

170 IAC 1-1.1-5 provides:

- (a) Any individual or entity may informally complain to the commission's consumer affairs division, with respect to any matter within the jurisdiction of the commission.
- (b) An informal complaint is without prejudice to the right to file a formal petition under IC 8-1-2-54.
- (c) An informal disposition rendered by the commission's consumer affairs division may be appealed by any party thereto under IC 8-1-2-34.5 upon written request for appeal filed with the commission within twenty (20) days after the informal disposition is rendered. Prior to issuing an order on the appeal, the commission shall afford the parties notice and an opportunity to be heard.

In the Prehearing Conference Order issued in this Cause on September 29, 2004, the Commission stated that the review to be conducted in this Cause would presumptively consist of a review of the record as compiled by the Consumer Affairs Division (the "Record") and argument that the parties would be allowed to present based on the Record. The Prehearing Conference Order allowed the parties an opportunity to review the Record and to file motions to supplement the Record with 1) information that had been submitted to the Consumer Affairs Division but is now missing from the Record, or 2) additional evidence that is not part of the Record.

On November 3, 2004, Park Jefferson Apartments ("Complainant") filed: 1) a *Motion to Supplement Record* and 2) a motion titled *Objections to the Record*. On November 8, 2004, Northern Indiana Public Service Company ("Respondent"), filed a motion titled *Designation of Additional Proposed Evidence*. These three (3) motions are the subject of this Entry.

Complainant desires to supplement the Record with evidence that may be elicited through discovery, evidence presented through the live testimony of certain named and unnamed witnesses, and additional documentary evidence related to the issues in this Cause. In addition, Complainant objects to Commission consideration of specified documents in the Record that Complainant contends are inadmissible under the Indiana Rules of Evidence, including, but not limited to, hearsay objections.

Ind. Code 8-1-2-34.5(b) describes two separate and distinct processes by which individual customer complaints presented to the Commission may be reviewed and decided. One process describes a formal proceeding in which the Commission conducts an investigation that results in a Commission order. The second process, designed to be informal since only the Commission conducts formal proceedings and issues orders, allows the Commission to establish an appeals division to make binding decisions on its behalf. The Commission has established its Consumer Affairs Division as its appeals division. Ind. Code 8-1-2-34.5(b) refers to establishing an "appeals" division because Ind. Code 8-1-2-34.5(a) requires the Commission to establish rules that govern relations between public utilities and their customers, including rules that govern complaints. The Commission has adopted rules governing customer complaints at 170 IAC 4-1-17. A customer dissatisfied with a utility's resolution of a complaint can "appeal" the utility's decision to the Commission. The Commission itself can then investigate and decide the appeal or delegate the appeal to its appeals division. Decisions of the appeals division, though binding, are subject to Commission review upon timely request.

The complaint reviewed by the Consumer Affairs Division in this Cause was initiated in January 2002 and the Consumer Affairs Division's written decision was issued on May 17, 2004. In the course of its review, the Consumer Affairs Division accumulated and generated a significant amount of documentary information. Most of this information was submitted by the Complainant and Respondent. The written decision of the Consumer Affairs Division explained the reasons for its decision. Complainant's request to supplement the Record is very broad and would, in effect, have the Commission conduct a de novo, formal investigation of the subject complaint. A

review of an individual customer complaint by the Consumer Affairs Division is conducted in lieu of the Commission conducting a formal proceeding. The purpose of allowing the Consumer Affairs Division to make binding decisions on behalf of the Commission would be defeated if the standard for Commission review allowed the affected parties, once a decision by the Consumer Affairs Division had been rendered, to develop a new body of evidence to be considered for the first time in a formal Commission proceeding. It is appropriate and in accordance with Ind. Code 8-1-2-34.5(b) and 170 IAC 1-1.1-5, that Commission review of decisions made by the Consumer Affairs Division be reasonably limited to a review of the record that was established by the appeals division and allowing the parties an opportunity to be heard.

It is also appropriate, once Commission review of a decision by the appeals division is sought, that the parties to the complaint have an opportunity to examine the record as established by the Consumer Affairs Division for accuracy and completeness. It is possible, for example, that a party does not have all of the information contained within the appeals division's record. Some requests for Commission review may include a request to supplement the record. For example, information previously submitted by a party may be missing from the record or there may be some newly discovered and discrete piece of information that a party contends should be included within the record to be reviewed by the Commission. There may be other examples of situations that would support a request to supplement the record, but any such situation should be consistent with a standard of Commission review that is reasonably restricted to a review of the information considered by the appeals division.

Even though the Prehearing Conference Order provides for informal discovery, the Record indicates that the Complainant and Respondent exchanged information between themselves and submitted information to the Consumer Affairs Division. While there are several references in the Record to the parties' exchanges of information, there is no indication that either of these parties was unable to adequately present its position to the Consumer Affairs Division. In addition, Complainant offers no justification in its *Motion to Supplement Record* for the need, vis-à-vis the Record as it now exists, to supplement the Record in the manner and to the extent that Complainant requests.

Complainant's *Motion to Supplement Record* is not a reasonable request in the context of the Commission reviewing a decision of its appeals division, pursuant to Ind. Code 8-1-2-34.5(b). To grant Complainant's broad request to supplement the record with additional documentary evidence, evidence obtained through discovery, and live witness testimony, would render ineffective the Consumer Affairs Division's binding decision-making authority. Balancing the Prehearing Conference Order's standard of review expectation with its discovery provision leads to a conclusion that, in the context of the Commission acting in this appellate capacity, the discovery requested by Complainant should not be allowed. Complainant's request to supplement the Record goes beyond any reasonable supplementation contemplated by the Prehearing Conference Order.

With respect to Complainant's objections to the record, the Commission has adopted a procedural rule at 170 IAC 1-1.1, which governs formal Commission

proceedings. The Indiana Rules of Evidence also have general applicability to formal Commission proceedings, to the extent they are consistent with the Commission's rule. (See: 170 IAC 1-1.1-26) However, it should not be expected that information collected during the course of an informal Commission proceeding, such as that delegated to the Consumer Affairs Division, would be subject to compliance with the Indiana Rules of Evidence. Likewise, it should not be expected that, upon request for Commission review of a Consumer Affairs Division's decision, all information collected by the Consumer Affairs Division should, at that point, become subject to compliance with the Rules of Evidence. Requiring the customer complaint appeal function delegated to the Consumer Affairs Division to adhere to either the Commission's formal procedural rules or the Indiana Rules of Evidence would run counter to the purpose of an informal review process for individual customer complaints. Likewise, it would be unreasonable to require that information accumulated by the Consumer Affairs Division demonstrate compliance with these formal procedural and evidentiary rules as a prerequisite to Commission review of that information.

Part of Respondent's request to supplement the record is based on information that certain worksheets, previously submitted to the Consumer Affairs Division during the course of its review, are now missing from the Record. The worksheets purport to contain account activity for each of Complainant's apartments. It is appropriate, and within the Commission's expectation that a complete Record be reviewed, to allow the Record to be supplemented with the missing worksheets. Respondent also seeks to conduct discovery, but only if Complainant's request to conduct discovery is granted. Finally, Respondent does not make a request to present live witness testimony, but states that, if requested by the Administrative Law Judge, it can have a witness available to explain its evidence.

As is not always the case, both the Complainant and Respondent are represented by legal counsel in this individual customer complaint proceeding. Despite the fact that no party contested any of the motions that are under review in this Entry, granting any of the motions should not be an empty exercise, but should require that the motions have merit. While there may be some argument that Complainant and Respondent should be allowed to expand the Record with additional documentary evidence, evidence obtained through discovery and live witness testimony, to do so would put the Consumer Affairs Division's binding review process at risk. Scarce resources within the Commission dictate that the binding decision-making process delegated to the Consumer Affairs Division for individual customer complaints be preserved. Ind. Code 8-1-2-34.5 recognizes the issue of finite Commission resources by authorizing the Commission to investigate and issue orders with respect to individual customer complaints or to allow an appeals division to make binding decisions on its behalf. Accordingly, timely request for Commission review of a decision made by the Consumer Affairs Division should be reasonably limited to a review of the complete record of information established by the Consumer Affairs Division and providing the parties an opportunity to be heard. Prior to the conclusion of this proceeding, the parties will be provided an opportunity to present argument based on the Record.

In accordance with the above discussion, Complainant's *Motion to Supplement Record* and motion titled *Objections to the Record* should be denied. Respondent's motion titled *Designation of Additional Proposed Evidence* should be granted only with respect to supplementing the Record with the worksheets that were previously submitted to, but are now missing from, the Record. The discovery request in Respondent's *Designation of Additional Proposed Evidence* is made moot by the ruling on Complainant's motions.

IT IS SO ORDERED.

William G. Divine
William G. Divine, Administrative Law Judge

12-10-04
Date